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Supreme Court, U.S.
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No. 97-701

In The

# Supreme Court of the United States

October Term, 1997

HIGH RIDGE ASSOCIATION, INC.

*Petitioner,*

v.

AARON E. GREEN AND RUTH E. GREEN

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland**

## RESPONDENTS' BRIEF IN OPPOSITION

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5.03(a) "*Preparation; contents generally.* – Before exercising the powers referred to in § 5.02, the planning commission shall prepare regulations governing the subdivision of land within its jurisdiction. Those regulations may provide for the adequate control of shore erosion; the control of sediment and the protection from flooding; the proper arrangement of streets in relation to other existing planned streets and to the master plan; the adequate and convenient placement of public school

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sites and of open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air and the avoidance of congestion of population, including minimum width and area of lots." . . .

5.04 "*Plat approval and disapproval generally.* – The planning commission shall approve or disapprove a final plat, if all subdivision regulations have been complied with, within thirty (30) days after the submission thereof to it; otherwise such plat shall be deemed to have been approved and a certificate to that effect shall be issued by the commission on demand. Provided, however, that the applicant for the commission's approval may waive this requirement and consent to an extension of such period. The ground of disapproval of any plat shall be stated upon the records of the commission. Every plat approved by the commission shall by virtue of such approval, be deemed to be an amendment of or an addition to or a detail of the plan and a part thereof. Approval of a plat shall not be deemed to constitute or effect an acceptance by the public of any street or other open space shown upon the plat. The planning commission may, from time to time, recommend to the local legislative body amendments of the zoning ordinance or map or additions thereto to conform to the commission's recommendations for the zoning regulation of the territory comprised within approved subdivisions. The commission shall have the power to agree with applicant upon use, height, area or bulk requirements or restrictions which are designed to promote the purposes of the zoning ordinance of the

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jurisdiction. Such requirements or restrictions shall be stated upon the plat prior to the approval and recording thereof and shall have the same force of law and be enforceable in the same manner and with the same sanctions and penalties and subject to the same power of amendment or repeal as though set out as a part of the zoning ordinance or map of the jurisdiction. (An. Code, 1951, § 27; 1939, § 27; 1933, ch. 599, § 18; 1961, ch. 272; 1970, ch. 672, § 1.)

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## ARGUMENT

### A. PETITIONER'S MISSTATEMENT OF FACTS

The Petitioner's version of the facts as set forth in its Petition for Writ of Certiorari is so biased and incomplete that Respondents will simply restate the material facts as substantiated by the record of the case and adopted by the lower Courts.

The Respondents, the Greens, own a farm in Carroll County comprised of approximately 135 acres. A portion of the farm is eligible for residential development at the eastern termination of an existing County-owned road known as High Ridge Drive. The Petitioner is a home-owner's association which apparently objects to any such development. On November 19, 1991, the Carroll County Planning and Zoning Commission confirmed that the Greens proposed subdivision of thirteen (13) lots of about 1-2 acres each in the Agricultural Zoning District met the applicable planning and zoning requirements. A rectangular strip of land owned by Petitioner and ultimately condemned, which is fifteen (15) feet by fifty (50) feet in size, lies in the path of High Ridge Drive which was intended to be extended into the Green property. Unfortunately, this small strip was not included as part of High Ridge Drive when the existing High Ridge subdivision was recorded in the 1970s and it was not dedicated to the County as was the remainder of High Ridge Drive. As a result there is a small fifteen (15) feet wide gap between the Green property and existing High Ridge Drive.[1] The

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[1] This small 750 square feet rectangular strip is already encumbered by a right-of-way of record which includes a

terminus of High Ridge Drive was constructed as a *temporary* cul-de-sac in the 1970s so that it could be removed and extended in the future.

When the Greens decided to develop this portion of their property they discovered the problem and raised the issue with Carroll County. The County Commissioners, the executive body of the County, then met with members of the Petitioner, i.e. members of the objecting homeowner's association, and referred the matter to the Carroll County Planning and Zoning Commission for study. The planning staff pointed out that the original plan in the 1970's showed "by an absence of permanent cul-de-sac, that the roads were intended to provide access for future development into adjacent properties". Petitioner's representatives also participated in the Planning Commission's deliberations. Upon considering a detailed Special Report from its staff and hearing from the interested parties, the Planning and Zoning Commission found that the gap was due to an error in the approval of the record plat for the High Ridge Subdivision and that High Ridge Drive was in fact intended to be extended into the Green property. The Planning Commission minutes summarize its holding as follows:

> " . . . The Commission, on motion of Mr. Fisher, seconded by Mr. Pecoraro and carried, approved

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driveway actively used by the Greens. The Association never had the right to use this strip of land in any way inconsistent with the existing right-of-way. Therefore, its only use was for access to the Association's remaining lands. If converted to a public roadbed, this access will go unhindered and may even be improved.

> the concept plan as presented and as conditionally recommended above by the staff. In taking this action, the Commission on review finds, that the road in question as detailed and approved, on the approved preliminary subdivision plan was clearly laid out to extend to and intersect with the adjoining property line of the Aaron Green property; and further that the final plat prepared for record, deviated from the approved plan and was therefore in error in that it did not reflect what had been intended and approved (the eventual extension of the street into adjoining property)."

Even the Petitioner's expert at trial agreed that the road was planned to be extended into the Green farm at the location shown on the record plat and that the Greens' subdivision plan was a good one.

The findings of the Planning Commission were promptly forwarded to the Carroll County Commissioners and considerable deliberations ensued until they voted to condemn on February 27, 1992, some thirteen (13) months after this matter was first brought to them.

The Commissioners considered the findings of the Planning and Zoning Commission and further found that alternative access to the property would involve one-half (1/2) mile more public street which would increase the cost of maintenance to the County and ultimately to the taxpayers. The trial judge specifically noted this rationale in his written decision. (Petition, Appendix B-5). The record reflects that the Carroll County Commissioners acted: a) to carry out the intent of the Master Plan by establishing a link for the extension of a planned public road; b) to correct the error in the adjacent subdivision

approval which created the spite strip; c) to avoid a haphazard extension of public streets[2] into the Green farm which would be longer and more costly to plow and maintain [Commissioner Dell stated that he viewed the site and felt that the Nottingham Road access was ill-advised, in part, because it involved one-half mile more street which would increase cost of lots and maintenance costs to County]; d) to assure that new residences would be served by a County-owned road, constructed to the latest standards, open to the general public and maintained by the County; e) to maintain the integrity of the County's rural development guidelines; f) to facilitate the preservation of open space and farmland by clustering lots along this short extension of an existing road; and g) to facilitate the clustering of homes away from environmentally sensitive areas.

Unable to acquire the strip of land by agreement, the County Commissioners filed a Complaint in the Circuit Court for Carroll County on July 27, 1992 to condemn it under the rules governing such takings in Maryland. The trial Court found the condemnation to be proper and entered judgment accordingly. The County posted the One Thousand Dollars ($1,000.00) in damages for the land as stipulated between it and Petitioner[3] and the final

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[2] MD. CODE ANN., Article 66B, Section 5.03(a) requires planning of street systems upon subdivision approval. Section 5.04 effectively makes the 1970's street layout at the High Ridge Subdivision a "detail" of the Carroll County Master Plan, and "a part thereof."

[3] Petitioner was entitled at trial to show adverse or oppressive impacts from the taking which may have been compensable, but it offered no such evidence.

recordation occurred on June 30, 1994, whereby the taking occurred under Maryland law. Petitioner appealed the trial Court's ruling to the Maryland Court of Special Appeals, the State's intermediate appellate Court. However, as the Maryland Court of Appeals noted (Petition, Appendix A-5), a new Board of County Commissioners was elected while the appeal was pending and the County then unlawfully sought to abandon the taking on February 21, 1995. The Greens filed a Motion to Strike the abandonment. The Court of Special Appeals disallowed the County's wrongful attempt to abandon under Maryland law which prohibits abandonment once the taking has occurred; but the Court denied the Green's motion to intervene as a matter of right at that time and withheld action on the issue of permissive intervention. This is explained in its Opinion and Order dated March 24, 1995 (Appendix A). Once the County expressed its intent not to participate in the appeal, the Court granted the Greens' request for permissive intervention under the Maryland Rules by Order dated May 8, 1995. The Greens' Preliminary Plan of subdivision had been approved by Carroll County on November 18, 1994, i.e., after the taking occurred. The taking had resolved the issue of road frontage for the subdivision.

After the Court of Special Appeals reversed the trial Court on the merits, the Court of Appeals granted the Greens' Petition for Writ of Certiorari and ultimately restored the judgment of the trial Court and upheld the taking. The appropriateness of the taking was the only issue before the Court. The State's highest Court specifically denied Petitioner's cross-petition for Writ of Certiorari on the issue of the Greens' permissive

intervention. The Petitioner did not seek review of the lower Court's determination that the County was barred by State law from abandoning the condemnation.

### B. THE CONDEMNATION WAS NOT UNCONSTITUTIONAL

The written opinion issued by the Maryland Court of Appeals (Petition, Appendix A) is exhaustive in its recitation of the Maryland appellate decisions in this area. The Court found a very well-settled body of case law and had no problem in validating the condemnation for a public road.

Likewise, the law in this area under the Fifth Amendment appears to be well-settled by this Court. In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L. Ed. 27 (1954), the Court reviewed the Public Use Clause of the Fifth Amendment made applicable to the States through the Fourteenth Amendment as it applied to District of Columbia Redevelopment Act of 1945. The Act permitted the use of eminent domain power to redevelop slum areas for the possible sale or lease to "private" interests. In discussing whether such takings were for "a public use", the Court stated:

> "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete

> definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. (citations omitted)." 348 U.S. at 32; 75 S.Ct. at 102.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed. 2d 186 (1984), the Supreme Court defined the role of the Courts in reviewing a legislative judgment of what constitutes public use. The issue in *Midkiff* was the constitutionality of Hawaii Land Reform Act of 1967 (Act), which created a land condemnation scheme whereby title to real property is taken from lessors and sold to *"private"* lessees in order to reduce the concentration of land ownership. In upholding the Act, the Court stated:

> "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers. There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court, in *Berman*, made clear that it is 'an extremely narrow' one. The Court, in *Berman*, cited with approval the Court's decision in *Old Dominion Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70, L.Ed. 162 (1925), which held that deference to the legislature's 'public use' determination is

> required 'until it is shown to involve an *impossibility.*' The Berman Court also cited to *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843 (1946), which emphasized that '[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896) . . . "Where the exercise of the eminent domain power is rationally related to a *conceivable* public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause (emphasis added)" 104 S.Ct. at 2329.

This judicial test was again recognized more recently in *National Railroad Passenger Corporation v. Boston and Maine Corporation*, 503 U.S. 407, 422, 112 S.Ct. 1394, 1404 (1992).

### C. RESPONDENTS' INTERVENTION IN STATE COURT DOES NOT PRESENT FEDERAL QUESTION

The Greens were granted permissive intervention by the Maryland Court of Special Appeals under the Maryland Rule of Procedure 2-214 after the County unlawfully attempted to abandon the completed condemnation and then declined to further participate in the appeal.

By allowing the Greens to participate the Court was able to ensure that both sides of the issue would be fully represented. At this point, the Greens had a keen interest in the outcome due to their detrimental reliance on the completed taking when processing and gaining County approval of their subdivision plan. In its opposition to the Greens' motion to intervene in the lower Court, the Petitioner never raised any constitutional ground for its objection to the intervention as it does now. Petitioner addressed this issue twice in written pleadings in the Court of Special Appeals and again in its failed Cross-Petition for Writ of Certiorari in the Court of Appeals without ever suggesting any constitutional issue. Therefore, Petitioner is barred from raising this issue now.

In any event, Petitioner cites *United States v. 36.96 Acres of Land*, 754 F.2d 855 (1985) in support of its position. However, the procedural approach to an issue on intervention under the Federal Rules, though it may be instructive to a state court, is neither mandated on the state court nor necessarily indicative of the constitutional parameters applicable to the issue. Furthermore, the Court, in *United States v. 36.96 Acres of Land, supra*, denied intervention as a matter of right just as the Maryland Court did in this case. The Court went on to state that permissive intervention under Federal Rule 24 is wholly discretionary with the lower court and let the decision of the lower court to deny intervention in that case stand where the condemning authority's initial action to condemn was still pending.

This issue is beyond the Court's jurisdiction and permissive intervention was within the sound discretion of the lower court anyway.

## REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

Despite the unusual procedural history of this case, the only federal issue raised is the appropriateness of the taking in this case, i.e., whether there was public purpose and necessity for the taking. This case does not involve a regulatory taking because the Petitioner received due process and full compensation under the law governing eminent domain in Maryland.

Instead, this case involves the government's decision to exercise its powers of eminent domain to further an essential governmental function, i.e., the planning and approval of public roads and road systems. If the government's right to exercise this discretion were unduly restrained, the very wheels of progress and sensible planning would be sacrificed. Any reversal of the established law is this area would create a chilling effect on this governmental function because of the fear that a Court would substitute its judgment for that of the condemning authority. Good public projects would be lost or avoided. Under the existing law, there is already the necessary authority on the part of the Courts to invalidate the action of a condemning authority where it is arbitrary, malicious or oppressive. This acts as a guard against violations of constitutional rights. The existing state of this law works fine and needs no tinkering.

So long as government pays it way for those projects it reasonably determines to be in the public interest, there is no call to limit government's tools to institute sound land use planning.

## CONCLUSION

Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari in its entirety and award costs in its favor against Petitioner.

Respectfully submitted,

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## APPENDIX A

## IN THE COURT OF SPECIAL APPEALS OF MARYLAND

| | | |
|---|---|---|
| HIGH RIDGE ASSOCIATION, INC. | * | No. 1388 |
| v. | * | September Term, 1994 |
| COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND | * | |

## OPINION AND ORDER

On 21 February 1995 the County Commissioners of Carroll County, Maryland (the "County"), appellee, filed an Election to Abandon with this Court. The County, on the authority it asserted existed in Rule U26 and Md. Code Ann., Real Property Article, §12-109, sought thereby to abandon the condemnation that it had prosecuted below and which underlay this appeal taken by High Ridge Association, Inc. ("High Ridge"), the entity that had owned the real property condemned by the County. Upon learning of the County's effort to abandon the condemnation, Aaron and Ruth Green, owners of undeveloped real property abutting the condemned property, filed with us on 27 February 1995 a Motion To Intervene in this appeal and a Motion to Strike the County's Election To Abandon. The Greens alleged their property would benefit from public ownership of the condemned land in that it could be dedicated for use as a public road access to serve a portion of the Greens' property (thus also satisfying local legal requirements of public road frontage for subdivision and land development purposes

as to the Greens' land). Essentially the Greens argue in the two motions that they have cognizable interests in the proceeding that are not being represented by the current parties to the appeal, and that the County has proceeded too far in the condemnation process to bail out, absent a ruling on the merits of the appeal. High Ridge's appeal challenges the public purpose of the County's exercise of eminent domain in this instance. Responding to the Greens' initiative, the County and High Ridge filed a Joint Suggestion of Mootness with this Court on 6 March 1995. Appended to this motion was a 17 February 1995 written "Conciliation Agreement" between the previously antagonistic parties that provided, *inter alia*:

1. The County would file an election to abandon and thereafter receive back the money it had paid into court as compensation for the condemned property.

2. High Ridge would dismiss the pending appeal.[1]

3. Each side would bear its own costs and expenses.

The Greens allege that the change of heart by the County between the initiation of the condemnation and the present time is explained by a change in the composition of the members on the Board of County Commissioners due to the Fall 1994 election.

## Election To Abandon

The County cannot abandon the condemnation proceeding because a taking has occurred. Both Rule U26 (**Abandonment.**) and Md. Code Ann., Real Prop. Art.

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[1] Obviously, this has not been done.

§12-109 (**Abandonment of condemnation proceeding.**) provide that "no condemnation proceeding may be abandoned after a taking has occurred." Md. Code Ann., Real Prop. Art. § 12-102 prescribes when a taking has occurred. Section 12-102(1) defines the time of taking in "quick-take" cases; Section 12-102(2) states that a taking occurs *"[i]n every other case,* if the plaintiff pays the judgment and costs pursuant to Subtitle U of the Maryland Rules" (emphasis added). This is not a quick-take case. Therefore, because a copy of the inquisition was recorded among the land records of Carroll County, and the County paid the Judgment to the circuit court on 30 June 1994, by definition a taking occurred on 30 June 1994. *See, Dodson v. Anne Arundel County,* 294 Md. 490 (1982) ("there is no taking until the judgment is paid, a certificate of payment filed, and the inquisition recorded").

Although the County may not have taken physical possession of the property yet, it is clear "that a taking of property may occur without actual physical appropriation, entry or seizure." *Hardesty v. State Roads Comm'n,* 276 Md. 25, 31 (1974) (holding that State Roads Commission was not permitted to abandon [quick-take] condemnation proceedings; the finding was based in part upon "the length of time involved before the Commission elected to abandon condemnation [approx. 10 months], and the legal restrictions placed upon the property during the pendency of the condemnation proceedings.")

Because this case does not involve a "quick-take" case, the filing of the plat and the posting of money with the court were enough to constitute a taking. The County now owns the subject property, subject to the outcome of this appeal.

**Greens' Intervention**

The requirements for intervention are set forth in Rule 2-214, which provides for both intervention as a right and permissive intervention. There is no doubt that the Greens have alleged how they may have been detrimentally affected by the County's attempted abandonment. Specifically, in reliance on the County's initial plan to extend High Ridge Road onto their property, they claim to have spent in excess of $20,000 in connection with creating and obtaining approval of the preliminary plan of subdivision to develop their property.

The County and High Ridge, however, argue in their Joint Suggestion of Mootness that the Greens cannot intervene because: (1) there is no proceeding that remains pending in this Court for them to intervene in; (2) their motion to intervene was not timely filed; and (3) Maryland law prohibits adjoining property owners from intervening in condemnation proceedings.

As we have determined that the County may not abandon the condemnation proceeding at this juncture, and assuming High Ridge opts not to dismiss this appeal, then an action would remain in which the Greens may attempt to intervene.

Whether the Greens have a right to intervene in this proceeding, however, appears questionable. They were not parties to the circuit court litigation. The Court of Appeals determined in *Coalition for Open Doors v. Annapolis Lodge No. 622*, 333 Md. 359 (1994) that there may be unusual circumstances which permit a postjudgment intervention. The Court in Open Doors further noted that "where the losing party decides not to appeal,

the cases have upheld post-judgment intervention for purposes of appeal when the applicant has the requisite standing and files the motion to intervene promptly after the losing party decides against appeal." *Id.* at 41. Based upon the Court's reasoning in *Open Doors*, the instant case might present the "exceptional circumstances" necessary for a post-judgment intervention. The Greens filed the Motion to Intervene only days after learning of the Board's attempt to abandon. "Based upon the individual circumstances of th[is] case," their motion would be timely. The question remains, however, whether the Greens have the requisite standing to intervene.

At first blush, Maryland property law appears to state that adjoining property owners do not have a sufficient property interest as to entitle them to intervene in condemnation proceedings. *Feldman v. Star Homes, Inc.*, 199 Md. 1 (1951). At issue in that case was a complaint by property owners that a subdivision plan approved by the Baltimore City Planning Commission would irreparably damage their properties. Property owners requested an injunction and asked for public hearings to be ordered. In rejecting their appeal, the Court of Appeals explained that, "neither of the proposed streets touch the appellants' lots at any point, nor would any conceivable extension or continuation of such streets cross their property" [although appellants' lots did abut some of the proposed housing lots].

The facts in *Feldman* are, however, distinguishable from those involved in the instant appeal. First, the Greens' property rights may be directly affected by whether the continuation of a public road onto their property occurs. Furthermore, the County authorities not

only approved the Greens' development plan, the County had acquired property in preparation for that development. This situation differs from *Feldman*, where the Court stated "[i]n the instant case it does not appear that property rights of the appellants were affected by the Commission's approval. If such approval gave the street layout the status of an Official Detailed Plan, this did not amount to a public taking or acceptance, but "solely as a designation of the location shown thereon for future acquisition for public use." *Id.* at 6-7.

A cursory review of cases in other jurisdictions that dealt with the right of adjacent property owners to intervene in condemnation proceedings shows that, barring any specific statutory direction to the contrary, in most states adjoining owners have no absolute right to intervene in condemnation proceedings.

We shall deny that part of the Greens' motion that seeks to have their intervention as parties recognized as a matter of right. We do not need to rule yet whether they will be allowed to intervene as a matter of our discretion under the exceptional circumstances asserted, or as amicus curiae. This deferral is appropriate because, as a result of our rejection of the County's Election To Abandon (and concomitantly the Joint Suggestion of Mootness), we have left the current parties in a theoretically adversary situation in a "live appeal." The Greens' interest, such as it is, will likely be protected in this context. Subject to High Ridge dismissing the appeal or any reaction to the County's brief to be filed, we will consider what remains of the Greens' Motion To Intervene, as appropriate. We may consider, among other things, whether the County files a brief and, if it does, whether

its content is the equivalent of a capitulation to High Ridge's contentions.

IT IS, THEREFORE, ORDERED this 24th day of March 1995 by the Court of Special Appeals that the Greens' Motion to Intervene as of right is hereby denied, and that, to the extent said motion seeks intervention as a matter of our discretion or as amicus curiae, said motion may be considered in the future subject to the considerations mentioned in this Opinion, among other things; and, it is further

ORDERED, that the County's Election To Abandon and the parties' Joint Suggestion of Mootness are stricken on our initiative; and it is further

ORDERED, that the Clerk's office issue a new scheduling and briefing order, taking this case off the April 4, 1995 oral argument docket.

FOR A PANEL OF THE COURT

/s/ Alan M. Wilner
Chief Judge Alan M. Wilner

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## APPENDIX B

| | | |
|---|---|---|
| High Ridge Association, Inc. | * | In the |
| Appellant | * | COURT OF SPECIAL APPEALS |
| vs. | * | |
| County Commissioners of Carroll County, Maryland | * | No. 1388 |
| Appellee | * | September Term, 1994 |

ORDER

On February 21, 1995, Appellee filed in this Court an Election to Abandon the condemnation proceedings underlying the captioned appeal. On February 24, 1995, Aaron and Ruth Green filed a Motion to Intervene in this appeal and on February 27, 1995, they filed a Motion to Strike the County's Election to Abandon. In response to the Greens' motions, Appellant and Appellee filed a Joint Suggestion of Mootness on March 6, 1995.

In an Opinion and Order dated March 24, 1995, this Court struck the County's Election to Abandon and the parties' Joint Suggestion of Mootness. The Opinion and Order also denied that part of the Greens' motion that sought to have their intervention as parties recognized as a matter of right, and deferred a ruling on whether they would be allowed to intervene as a matter of the Court's discretion under the exceptional circumstances asserted, or as amicus curiae. The basis of the deferral was that as a result of the Court's rejection of the County's Election to Abandon and the Joint Suggestion of Mootness, the appellant and appellee were left in a theoretically adversary situation in a "live appeal." The Court provided for

future consideration of the Motion to Intervene as a matter of the Court's discretion, or as amicus curiae, subject to the appellant dismissing the appeal, or any reaction to the appellee's brief to be filed, including whether the content of the appellee's brief were the equivalent of a capitulation to the appellant's contentions.

On April 5, 1995, counsel for the appellee filed a a letter with this Court indicating that appellee would not be filing a brief or participating in oral argument. This Court has now read and considered the Greens' Renewal of Motion to Intervene, filed on April 21, 1995 and the appellant's response to the motion filed on May 2, 1995, and finds that because there is no party presenting the case for affirmance of the judgment of the trial court, it is appropriate for the Greens to intervene as appellees. It is, therefore, this 8th day of May, 1995, by the Court of Special Appeals,

ORDERED that the Renewal of Motion to Intervene is granted and the Greens may intervene as appellees in the captioned appeal. It is further

ORDERED that the appellees' brief shall be filed on or before May 15, 1995. Argument shall remain scheduled on June 5, 1995.

For a Panel of the Court

/s/ Alan M. Wilner
CHIEF JUDGE